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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/724,839	12/01/2003	Gregory Dean Sunvold	P147	2171
27752 7590 04/22/2009 THE PROCTER & GAMBLE COMPANY Global Legal Department - IP Sycamore Building - 4th Floor 299 East Sixth Street CINCINNATI, OH 45202				
EXAMINER				
OLSON, ERIC				
ART UNIT		PAPER NUMBER		
1623				
MAIL DATE		DELIVERY MODE		
04/22/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/724,839

Applicant(s)

SUNVOLD ET AL.

Examiner

ERIC S. OLSON

Art Unit

1623

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 January 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-34, 36-38, 40, 42, 47, 49-51, 53 and 55-63 is/are pending in the application.
- 4a) Of the above claim(s) 1-31 and 56-63 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 32-34, 36, 37, 40, 42, 47, 49, 50, 53 and 55 is/are rejected.
- 7) ☒ Claim(s) 38 and 51 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Detailed Action

This office action is a response to applicant's communication submitted January 9, 2009 wherein claims 32, 36-38, 40, 42, 49-51, 53, and 55 are amended and claims 35, 39, 41, 43-46, 48, 52, and 54 are cancelled. This application was filed December 1, 2003 and makes no priority claims.

Claims 1-34, 36-38, 40, 42, 47, 49-51, 53, and 55-63 are pending in this application.

Claims 32-34, 36-38, 40, 42, 47, 49-51, 53, and 55 as amended are examined on the merits herein.

The terminal disclaimer submitted November 14, 2008, disclaiming the terminal portion of any patent granted on this application extending beyond the expiration of commonly owned US patents 6306442, 6475512, RE38112, 6818225, 5958898, 5965175, and 6093418, has been fully considered and entered into the record. This application is found to be persuasive to remove any rejections of record in the previous office action under the doctrine of obviousness-type double patenting over the issued claims of these patents. All said rejections are withdrawn.

Applicant's amendment, submitted January 9, 2009, with respect to the rejection of instant claims 32-36 and 47-49 under 35 USC 102(b) for being anticipated by Hayek et al., has been fully considered and found to be persuasive to remove the rejection as

the claims have been amended to require an amount of fructooligosaccharide that is below the amount taught by Hayek et al. Therefore the rejection is withdrawn.

Applicant's amendment, submitted January 9, 2009, with respect to the rejection of instant claims 32-34 and 47 under 35 USC 102(b) for being anticipated by Van Loo et al., has been fully considered and found to be persuasive to remove the rejection as the claims have been amended to require an amount of fructooligosaccharide that is below the amount taught by Van Loo et al. Therefore the rejection is withdrawn.

Applicant's amendment, submitted January 9, 2009, with respect to the rejection of instant claims 32-37 and 47-50 under 35 USC 102(b) for being anticipated by Vickers et al., has been fully considered and found to be persuasive to remove the rejection as the claims have been amended to require an amount of fructooligosaccharide that is below the amount taught by Vickers et al. Therefore the rejection is withdrawn.

Applicant's amendment, submitted January 9, 2009, with respect to the rejection of instant claims 32-35, 38-40, 47, 48, and 51-53 under 35 USC 102(b) for being anticipated by Howard et al., has been fully considered and found to be persuasive to remove the rejection as the claims have been amended to require an amount of fructooligosaccharide that is below the amount taught by Howard et al. Therefore the rejection is withdrawn.

Applicant's amendment, submitted January 9, 2009, with respect to the rejection of instant claims 32, 33, 35, 37, 47, and 48 under 35 USC 102(b) for being anticipated by Sparks et al., has been fully considered and found to be persuasive to remove the rejection as the claims have been amended to require an amount of fructooligosaccharide that is below the amount taught by Sparks et al. Therefore the rejection is withdrawn.

Applicant's amendment, submitted January 9, 2009, with respect to the rejection of instant claims 32-55 under 35 USC 103(a) for being obvious Howard et al., has been fully considered and found to be persuasive to remove the rejection as the claims have been amended to require an amount of fructooligosaccharide that is below the amount taught by Howard et al., and the reference does not give any reason for one of ordinary skill in the art to further reduce the concentration. Therefore the rejection is withdrawn.

The following rejections of record in the previous office action are maintained:

Claim Rejections – 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 32-34, 36, 40, 42, 47, 49, 53 and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hayek et al. (US patent 5958898, of record in previous action)

Hayek et al. discloses a method comprising feeding an animal a diet containing fermentable fibers. (column 1 lines 40-60) The fermentable fibers are preferably selected from various fibers including fructooligosaccharides and inulin. (column 2 lines 18-21) The food composition contains about 10% total dietary fiber (column 3 lines 6-12) of which 1-11% of the supplemental fiber is fermentable. (column 3 lines 38-42) In such as case, the fermentable fiber may be present in as low a concentration as 0.1%. In example 1, column 4, lines 13-28, an example is described in which dogs were fed a daily nutritionally balanced diet containing 1.5% fructooligosaccharides. Hayek et al. does not specifically exemplify a method in which the composition being administered comprises about 0.01-0.2% fructooligosaccharides.

It would have been obvious to one of ordinary skill in the art at the time of the invention to practice the method of Hayek et al. using a composition comprising 0.01-0.2% fructooligosaccharide. One of ordinary skill in the art would have been able to adjust the dosages and total volume of the compositions to determine the optimal composition to use. Doing so is part of the ordinary and routine level of skill in the art.

Thus the invention taken as a whole is *prima facie* obvious.

Response to Argument: Applicant's arguments, submitted January 9, 2009, with respect to the above ground of rejection, have been fully considered and not found to be persuasive to remove the rejection. Applicant argues that Hayek et al. does not

disclose a method wherein the composition being administered comprises from about 0.01-0.2% fructooligosaccharide, and that one of ordinary skill in the art would not have had any reasonable expectation of success in using such a low concentration for the methods described by Hayek et al. However, as discussed in the body of the rejection, the fermentable fiber can be present in an amount as low as 1% of the supplemental fiber. Given that the recommended amount of fiber in the foods composition is 10%, 1% of the supplemental fiber would be an amount of oligofructose in the composition of 0.1% or lower. Furthermore, column 2 lines 17-30 of Hayek et al. discloses a preferred fermentable fiber composition containing a ratio of 6:2:1.5 beet pulp to gum talha to fructooligosaccharide. Using this mix of fermentable fibers, in which the proportion of fructooligosaccharide is about 15% of the fermentable fiber, the amount of fructooligosaccharide could go as low as about 0.015%. (10% of the food is fiber, 1% of the fiber is fermentable, 15% of the fermentable fiber is fructooligosaccharide. Therefore one of ordinary skill in the art would have recognized from the teaching of Hayek et al. that the amount of fructooligosaccharide could be present in an amount of 0.01-0.2% of the food composition.

Therefore the rejection is deemed proper and made **FINAL**.

Claims 32-34, 36, 37, 40, 42, 47, 49, 50, 53, and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Van Loo et al. (US patent 6500805, of record in previous action)

Van Loo et al. discloses a method comprising administering fructans to an animal. (column 4 lines 12-28) In a preferred embodiment the fructan is inulin. (column 4 lines 61-67) Claims 11 and 15 of Van Loo et al. define the subject population for this method as being a human, a dog, or a cat. The daily dose of fructan is between 0.01-2 g/kg body weight. (column 5 lines 52-55. In a disclosed example rats were fed a nutritionally balanced diet comprising 10% chicory inulin. (column 7 lines 12-55) Note that rats can be companion animals. Because the method described by Van Loo et al. involves administering the same compounds to the same subjects as the claimed invention, any properties or effects of this method, such as improving bone health, strength, physical activity performance, calcium absorption, and other effects mentioned in the instant claims, are inherent in the disclosed method. Van Loo et al. does not specifically exemplify a method in which the composition being administered comprises about 0.01-0.2% fructooligosaccharides.

It would have been obvious to one of ordinary skill in the art at the time of the invention to practice the method of Van Loo et al. using a composition comprising the claimed amounts of fructooligosaccharide. One of ordinary skill in the art would have been able to adjust the dosages and total volume of the compositions to determine the optimal composition to use. Doing so is part of the ordinary and routine level of skill in the art.

Thus the invention taken as a whole is *prima facie* obvious.

Response to Argument: Applicant's arguments, submitted January 9, 2009, with respect to the above ground of rejection, have been fully considered and not found to be

persuasive to remove the rejection. Applicant argues that Van Loo et al. does not disclose a method wherein the composition being administered comprises from about 0.01-0.2% fructooligosaccharide, and that one of ordinary skill in the art would not have had any reasonable expectation of success in using such a low concentration for the methods described by Hayek et al. However, Van Loo et al. discloses a total dose of 0.01-2 g/kg of body weight. This dose specifies the total amount of fructan consumed, not its concentration within the food it is being consumed with. One of ordinary skill in the art would easily have been able to disperse the total dose (for example as low as 0.1-0.2g for a small 10-20kg dog) in the animal's food or water so that it is very dilute. If the dog drinks at least 100-200 mL of water per day, for example, dispersing the fructan in drinking water would result in a concentration of as low as about 0.1% fructan. Similarly, if the dog eats 100-200g of food a similar concentration would be achieved. The choice of the total dose administered and the choice of the concentration within the delivery vehicle are two separate parameters, and one of ordinary skill in the art would have been able to determine an appropriate concentration to achieve the desired dose. As a result, one of ordinary skill in the art would have recognized from the teaching of Van Loo et al. that the amount of fructooligosaccharide could be present in an amount of 0.01-0.2% of the food composition.

Therefore the rejection is deemed proper and made **FINAL**.

Conclusion

Claims 32-34, 36, 37, 40, 42, 47, 49, 50, 53, and 55 are rejected. Claims 38 and 51 are objected to for depending from a rejected base claim but would be allowable if rewritten in independent form incorporating all of the limitations of the rejected base claim and any intervening claims. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ERIC S. OLSON whose telephone number is (571)272-9051. The examiner can normally be reached on Monday-Friday, 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia Anna Jiang can be reached on (571)272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Eric S Olson/
Examiner, Art Unit 1623
4/16/2009

/Shaojia Anna Jiang/
Supervisory Patent Examiner, Art Unit 1623